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No. 791

In the Supreme Court of the United States

October Term, 1966

HARRY WALLERSTEIN, RECEIVER OF TELEVISION COMPANY OF AMERICA, INC., ALEX GOLD, and ROBERT W. HUGHES,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MADISON B. GRAVES
ROBERT W. HUGHES
Suite 1101, Newhouse Building
Salt Lake City, Utah
Attorneys for Petitioners
HARRY WALLERSTEIN
Receiver
ALEX GOLD
ROBERT W. HUGHES

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v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled action on the 15th day of August, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit Court is reported in ..... F.2d ....., and the petition for rehearing is denied in ..... F.2d ..... Copies of the opinions are attached hereto as Appendix A, and a copy of the Order of the Federal Communications Commission, from which appeal is made, is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on the 20th day of June, 1966. A Petition for rehearing was filed by petitioners with the District of Columbia Circuit Court, who denied it August 15, 1966. Jurisdiction to review the judgment in question by Writ of Certiorari is invoked under Rule 74 of the Federal Rules of Civil Procedure and applicable rules of this Court.

QUESTIONS PRESENTED

The Court of Appeals affirmed the order of the Federal Communications Commission (hereafter the "Commission"), wherein the Commission denied an appilcation for renewal of the television broadcast license of KSHO-TV, Las Vegas, Nevada, dismissed applications for consent to assign said license and to transfer the control of the license, and further denied reconsideration of the Commission's decision denying leave to open the record to adduce further evidence.

The Court of Appeals failed to consider or review any of the foregoing matters, but directed its attention to whether or not petitioners timely raised before the Commission their argument that they were the victims of "disparate treatment" to the Commission and could summarily held that petitioners had not made a claim of 'disparate treatment' to the Commission and could not raise such a claim for the first time on appeal. The undisputed facts show:

(a) On July 28, 1965, the Commission refused to renew the license of Television Station KSHO-TV, Las Vegas, Nevada. The Commission dismissed applications for consent to assign the license of said television station and the transfer of control of the licensee corporation to a new applicant.

(b) That Television Company of America, Inc. (hereinafter "TCA") was the licensee of KSHO-TV and was owned primarily by the Adelsons in 1958. During that year, and for some years before, through two previous groups of owners, KSHO-TV had operated at a substantial loss. Petitioner Gold was hired as General Manager for KSHO-TV by the Adelsons in November of 1958 (R. 1492) and has acted as its general manager to the present time.

(c) In the early part of 1959, Nevada Boadcasters Fund, Inc. (hereinafter "Fund") was incorporated. In February of 1959, the Fund entered into a contract with the Adelsons to purchase all of the stock in TCA. It was contemplated that the Fund would pay for the TCA stock from funds derived from a public offering of its stock. The stock offering was not sufficiently suc-

cessful for the Fund to pay the amount it contracted with the Adelsons; however, approximately 55 Nevada residents purchased a total of approximately $26,000.00 of stock.

(d) The Fund, unable to complete its initial agreement to purchase KSHO-TV, continued to negotiate through its officers with the Adelsons, and ultimately entered into a revised purchase agreement in July of 1959. This agreement was dated October 1, 1959. On October 13, 1959, the Fund filed an application for transfer of control of TCA to it, which was approved by the Commission on November 4, 1959.

(e) The major stock holdings of the Fund, during 1959, were not readily ascertainable, due to unfulfilled stock subscriptions and contemplated voting trust agreements between the shareholders of the Fund. At the time the Commission approved transfer of control, Reed R. Maxfield and his attorney controlled one-half of the Fund's stock and the other one half was controlled by a group headed by Howard Johnson, an experienced broadcaster who controlled several corporations which held broadcasting licenses. The main concern by the Commission of stock ownership in the Fund related to the Johnson group and a corporation they controlled; namely, KBLI, and their proposed operation and management of KSHO-TV.

(f) The members of the Johnson group were all known to the Commission, for their personal histories were in Commission files.

(g) KSHO-TV continued to lose money through

the year of 1959; however, its losses were not as great as those experienced in previous years.

(h) Maxfield, who was one of the majority stockholders in the Fund, and who was the largest creditor of the Fund by January of 1960, had invested in KSHO-TV approximately $86,000.00. He decided the only way he could recoup his investment was by acquiring control of the Fund and then selling out. He secured additional stock in the Fund which the Johnson group had not paid for, and with his attorney, who owned 5,000 shares, commenced offering for sale what constituted the controlling block of stock in the Fund.

(i) Johnson's group, aware of Maxfield's plan to sell, entered into negotiations with Maxfield whereby it was agreed that KBLI, Inc., an Idaho corporation, would acquire the Maxfield block of stock.

(j) KBLI, Inc. is a public corporation with two classes of stock, namely: 50,000 shares of common stock, and 750,000 shares of common nonvoting stock. The Johnson group owned all of the issued shares of common voting stock of KBLI, Inc. and approximately 1,500 Idaho residents owned approximately 699,000 shares of common nonvoting stock. At the time KBLI agreed to buy the Maxfield stock, it was offering to the residents of Idaho its common nonvoting stock.

(k) Shortly after the March 8, 1960, agreement was entered into between KBLI and Maxfield, KBLI was notified by the Idaho Securities Commission that it could not invest funds raised in Idaho in Nevada for the purchase of KSHO-TV. KBLI was on the horns of a dilemma. It was directed not to proceed with

its contract to acquire KSHO-TV but to recoup its investment under its contract with Maxfield.

KBLI, Inc., paid Maxfield $30,000 down and had advanced other moneys to the Fund, and KBLI was confronted with the problem of losing these sums unless it could satisfy Maxfield and still comply with the Securities Commissioner's mandate.

(l) KBLI sought the advice of expert Federal Communications Commission counsel who advised that the best and most practical solution to KBLI's dilemma was to seek a third person to purchase KSHO-TV who could afford it. In this regard, special counsel personally obtained a listing agreement which permitted him the exclusive right to offer for sale KBLI's interest and right of control of KSHO-TV.

(m) KBLI entered into an agreement with one Arthur Powell Williams, whereby he would purchase interests of both Maxfield and KBLI in the controlling block of stock of the Fund. Maxfield joined in this contract.

(n) Maxfield, after the contract with Williams, still had due him from KBLI, $55,000.00. Maxfield obtained from KSHO-TV an assignment of its accounts receivable as collateral for the foregoing indebtedness. These same accounts receivable had been originally owned by Adelsons, who transferred them to Maxfield at the time they divested themselves of control of KSHO-TV in December of 1959. Maxfield, in effect, cleared title to the accounts receivable he had owned for several months when KBLI, Inc., assented to his ownership. Maxfield

agreed to deliver to KBLI the following notes secured by accounts receivable, namely:

Date	*Amount*	*Maker*	*Payee*
5-13-59	$ 8,000.00	TCA	Mervyn Adelson
4-4-59	2,722.13	TCA	" "
5-4-59	12,000.00	TCA	" "
5-5-59	5,000.00	TCA	" "
5-8-59	3,000.00	TCA	" "
5-27-59	5,065.00	TCA	" "
5-28-59	2,400.00	TCA	" "
7-1-59	25,000.00	TCA	Fund

KBLI delivered $55,000.00 worth of the above notes to Maxfield to discharge its obligation under its March 8, 1960, agreement with him.

(o) In April, 1961, Maxfield proceeded to foreclose his notes against TCA. This action precipitated TCA's reorganization under Chapter XI of the Bankruptcy Act in the United States District Court for the District of Nevada, at Las Vegas, Nevada. TCA acted as a debtor in possession until October 18, 1961, when the District Court appointed Mr. Harry Wallerstein as Receiver. On November 16, 1961, the Commission granted an application for involuntary assignment of the license of KSHO-TV from TCA to Harry Wallerstein, Receiver in Bankruptcy. Receiver Wallerstein, since that date, has operated Television Station KSHO-TV and operates the station at the present time.

(p) Pursuant to the proceedings of Chapter XI, an arrangement was submitted by TCA to its creditors, who approved the plan which was accepted by the Court. In January of 1962, applications were filed with the Commission for its consent to the assignment of license

of KSHO-TV from the Receiver in Bankruptcy to TCA, which in turn would still be controlled by the Fund. However, the control of the Fund under the proposal would have been vested in Arthur Powell Williams. All previous stockholders in the Fund, except for the public stockholders in Nevada, agreed to dispose of their stock to Williams at cost, or to transfer it to him for no consideration. Thus, the proposed transfer of control of the Fund to Williams effectively eliminated all previous shareholders of the Fund who had any part in KSHO-TV which the Commission may have found objectionable.

(q) The Commission found that various contracts, ownership reports, and answers to their inquiries were not timely filed, or were not forthrightly answered. In connection with the first two categories of violations of Commission rules, petitioners Gold and Hughes have asserted that the matters complained of were not material, as the Commission already had in its files the basic information it required. Further, that the exact percentages of stock ownership were not known because of the constant flux and change in ownership positions and contemplated voting trust arrangements. The third category, of failing to answer Commission questions directly or forthrightly, applies only to KBLI and the Johnson group. They were not officers or directors of that corporation but were mere contemplative shareholders.

(r) Petitioners Gold and Hughes filed a Petition for Reconsideration, Rehearing and to Open the Record on August 30, 1965. In this Petition they raised the question of disparate treatment and listed twelve situ-

ations where licensees had been found guilty of similar conduct as TCA (R. 1716), which the Commission found as the basis for failing to renew KSHO-TV's license. In the instances cited, the violators received a minimum of $100.00 fines to a maximum of $1,500.00 fines, or a limited license renewal of one year rather than the usual three-year license. The Circuit Court handed down its "disparate treatment" theory in *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 231, 345 F.2d 730, on April 8, 1965.

The Commission in its Memorandum Opinion and Order denying Petitioners' Request to Reopen the Record and Request for Reconsideration released December 17, 1965, in paragraph 12, acknowledged Petitioners Gold and Hughes' request to reconsider its Order, which in effect, cancelled KSHO-TV's license in view of its mild penalties assessed other broadcasters guilty of the same misconduct (R. 1744E).

Notwithstanding the foregoing complicated series of events which finally led to a rehabilitated corporation controlled by persons who were without any fault before the Commission, the Commission found that the many shortcomings of previous shareholders, not all officers or directors, were so grievous that the license could not be renewed. The sole questions presented are:

1. Did petitioners Gold and Hughes timely raise their "disparate treatment" argument before the Commission?

2. Was the Commission bound to distinguish its action in refusing to renew Receiver Wallerstein's license when it had recently levied minimal fines or sanc-

tions against other broadcasters who had been found guilty of similar wrongful conduct.

3. Does the record sustain the Commission's order that the alleged wrongs committed were so grievous that they justify the destruction of valuable property rights and the frustration of the Bankruptcy Act in order to carry out processes of the Commission in regard to its duty to regulate the broadcasting industry.

STATUTES INVOLVED

Communications Act of 1934, as amended:

> Sec. 310(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Administrative Procedure Act.

> Sec. 10 (3) Scope of Review. - So far as necessary to decision and where presented the reviewing court shall decide all relevant ques-

tions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

On March 15, 1963, the Commission designated for evidential hearing the various applications on issues relating to possible unauthorized transfer of control of KSHO-TV, failure to file, or failure to file in timely fashion, reports and contracts required by Commission rules, and alleged omissions and misrepresentations in various reports, applications, letters, and statements filed with the Commission. The ultimate subsequent issue designated by the Commission (Issue 12) called for determination as to "whether, on the basis of the evi-

dence adduced under the foregoing issues, the proposed assignee, Television Company of America, possesses the requisite qualifications to be a licensee." The Commission issued a decision (1 FCC 2d 91, adopted July 28, 1965) which found no fault with the Receiver's operation of the station since 1961, but held that there has been unauthorized transfer of control of KSHO-TV involving a transfer of stock in the Fund and that the correct stockholdings in the Fund had not been reported in various reports and applications with the Commission. The Commission denied the Receiver's application for renewal of license and, in light of that action, dismissed the assignment and transfer applications effectively as moot.

The evidence relied upon by petitioners to sustain a reversal of the Commission's Orders and the Circuit Court is shown by the following facts:

PETITIONERS.

Petitioner Harry Wallerstein is the Court-appointed Receiver of TCA under appropriate provisions of Chapter XI of the Bankruptcy Act. Since his appointment he has operated KSHO-TV to the present time in the public interest, and the Commission has found no fault with his broadcast service.

Petitioners Alex Gold and Robert W. Hughes are transferors of stock to Arthur Powell Williams in the application which was dismissed by the Commission's action July 28, 1965 (1 FCC 2d 91).

In 1958, Television Station KSHO-TV was being operated at a loss by the Adelsons. In late 1958, peti-

tioner Gold became KSHO-TV's general manager (R. 1492) and has acted in this capacity until the present time.

In late 1958, petitioner Hughes, as attorney for Howard Johnson, was retained to explore the possibility of purchase of KSHO-TV for one of Johnson's broadcast corporation (R. 1492). When Johnson advised that he was not interested in purchasing KSHO-TV, petitioner Hughes, as attorney, caused to be formed a corporation known as Nevada Broadcasters Fund, Inc. On February 28, 1959, the Fund entered into a contract with the Adelsons to purchase their stock in TCA, licensee of KSHO-TV. A $25,000.00 down payment was made from $30,000.00 which had been borrowed by the Fund from Reed Maxfield. It was contemplated by the incorporators of the Fund that they would pay for KSHO-TV from proceeds derived from the public sale of the Fund's stock (R. 1493).

The Fund was not successful in its public sale of stock and was unable to complete its purchase of KSHO-TV. At this point, Howard Johnson again expressed interest in KSHO-TV and becoming a principal stockholder in the Fund. Negotiations were commenced with the Adelsons for a revised sales contract (R. 1495, 1496). It was finally agreed that Maxfield, in exchange for his previous $30,000.00 loan, would be given 30,000 shares of stock in the Fund. It was further agreed that Granite District, the licensee of Station KNAK, Salt Lake City, Utah, which Johnson controlled, would match Maxfield's previous investment. Additionally, 10,000 shares held by Carl Hulbert, one of the original stockholders of the Fund, were to be divided, five thou-

sand shares going to petitioner Hughes, and five thousand remaining with Hulbert. Thus, control of the Fund would be equally divided, Maxfield and Hulbert having 35,000 shares and Granite and Hughes having 35,000 shares (R. 1496).

A second contract to purchase KSHO-TV was signed on July 10, 1959 (R. 1497). This agreement was not filed until October 13, 1959, when it was filed as part of the transfer application of control of TCA from the Adelsons to the Fund. At the request of Washington, D.C. Communications Counsel, the date on the agreement was modified from July 10, 1959, to October 1, 1959 (R. 1500). The Commission approved the transfer of control of TCA on November 4, 1959, and settlement between the Fund and Adelsons occurred on December 22, 1959. KSHO-TV operated at a loss for all of 1959.

As part of the July agreement between Johnson and Maxfield, they agreed to match amounts needed to operate KSHO-TV; however, Johnson did not match Maxfield's contribution, and Maxfield decided to protect his investment by acquiring control of the Fund and then selling out the controlling stock. He secured some additional stock, and together with the 5,000 shares owned by his attorney, Hulbert, he gained control of the Fund (R. 1504, 1505).

Aware of Maxfield's plan to sell, Johnson had the executive committee of KBLI, Inc., licensee of station KBLI, Blackfoot, Idaho, which corporation Johnson controlled, voted to purchase control of KSHO-TV. Johnson and Maxfield worked out a contract dated March 8, 1960, and subsequent letter agreements.

KBLI, Inc., had been selling preferred stock to the public in Idaho. Shortly after the March 8 agreement with Maxfield, the Idaho Securities Commissioner informed KBLI, Inc., that it could not invest the proceeds from the sale of stock in Idaho outside the State of Idaho. Thus, KBLI, Inc., could not longer invest funds in KSHO-TV located in Nevada (R. 1507, 1508).

KBLI, after the March 8, 1960, agreement, made loans to the Fund in the amount of $45,514.00 (R. 1532). KBLI paid Maxfield $30,000.00 down upon executing the March 8, 1960, agreement (Wall. Ex. 37).

KBLI confronted Maxfield with its dilemma and that it would not be able to complete its contract, whereupon Maxfield advised KBLI that he would go along and not hold KBLI to the strict terms of their agreement.

The Communications Commission Counsel of Washington, D.C., advised KBLI that a practical way to solve its financial problems with Maxfield was to have a third party take up or buy out the KBLI-Maxfield contract. In this regard, Communications Counsel received a "listing agreement" which provided him with the exclusive right to offer for sale the control of KSHO-TV (Gold Ex. 8). This listing agreement contract was entered into in August of 1960.

KBLI was successful in following its Washington Communications Counsel's advice when it located Arthur Powell Williams to buy out the KBLI-Maxfield contract. In December of 1960 an agreement between KBLI, Maxfield, Hulbert, and Arthur Powell Williams was negotiated (Wall. Ex. 7).

After considerable negotiations between Johnson, Maxfield, Williams, and KBLI, a final agreement was reached June 15, 1961 (R-1515-1516).

Maxfield, under the March 8 agreement, had represented he would transfer and deliver to KBLI $63,-187.00 worth of promissory notes he had obtained from the Adelsons at the closing on December 22, 1959. These notes were secured by accounts receivable of KSHO-TV. Maxfield received approximately $55,-000.00 of promissory notes sometime in June or July of 1960.

In April of 1961 Maxfield sent an agent to KSHO-TV to foreclose on the notes he had received, or in the alternative, to receive KSHO-TV's accounts receivable which were collateral for the notes. On May 1, 1961, to prevent the foreclosure of the aforesaid notes, TCA filed its Petition for an arrangement under Chapter XI of the Bankruptcy Act. Sometime after the Petition was filed, Williams deposited $25,000.00 with the Court to establish his interest in the reorganization (R. 1518, 1519). Petitioner Harry Wallerstein was appointed Receiver in Bankruptcy, and, November 16, 1961, the Commission granted Wallerstein's application for involuntary transfer of KSHO-TV's license (R. 1490).

In July of 1961, applications were prepared and submitted to the Commission for the transfer of control of KSHO-TV to Williams. This application was withdrawn at the insistence of Maxfield who attempted to receive additional collateral and various indemnification from Williams. Finally, on January 31, 1962, the three applications involved in this proceeding were filed with

the Commission. In the application wherein Williams would receive control of the Fund, the contract between KBLI, Maxfield, Hulbert, and Williams was filed as Exhibit 1.

The preamble to this contract set forth in part the following:

> "WHEREAS, Maxfield and KBLI entered into an agreement on the 8th day of March, 1960, wherein Maxfield agreed to sell and KBLI agreed to buy 32,500 shares of Fund common stock, and
>
> "WHEREAS, the aforesaid contract has not *been fully consummated and Maxfield and KBLI are desirous of fulfilling in essence the terms of that agreement, and . . .* "

Maxfield assigned his block of stock to KBLI on the 18th of May, 1961 (Broad. Bur. Ex. 37(a)).

THE COMMISSION'S ORDER WAS NOT WITHIN THE EVIDENCE.

The conclusion that an unauthorized transfer of control of KSHO-TV had taken place was not supported by the evidence for the general manager of KSHO-TV was Alex Gold who had acted as general manager since his employment in 1958 by the Adelsons. The record is absolutely void of any overt acts of control or management by the Johnson group or officers of KBLI. In fact, the contrary was established. All of these men were involved in divesting KBLI from any ownership or control of KSHO-TV.

The Hearing Examiner concluded that misrepresentations were made to the Commission which were

calculated to secrete KBLI's unauthorized assumption of control of KSHO-TV in violation of Section 310(b) of the Communications Act (R. 1550). This conclusion was predicated upon answers furnished the Commission by affidavits of the officers of KBLI, Inc. (R. 1530, 1532). These representations are not attributable to the officers or directors of TCA, the Fund, or Receiver Wallerstein.

TCA, the Fund, or Receiver Wallerstein, or petitioners herein did not exercise any fraud or misrepresentations upon the commission, although they (except Wallerstein) were parties to late filings of contracts and to inadequate and not complete ownership reports. However, it is quite clear that these inadequacies were rather from lack of experience and lack of knowledge of Commission rules and regulations rather than from a design to deceive the Commission, for the record demonstrates that with every filing or document, the information believed to be requested and accurate, was filed with the Commission.

REASONS FOR GRANTING THE WRIT

SUMMARY

The Circuit Court by holding that petitioners had failed to timely raise the question of "disparate treatment" before the Commission simply avoids the very purpose of appeal to that Court in this matter. First, the record before the Commission does not permit such a finding; and second, question of sufficient evidence to support the actions and decision of the Commission was not reviewed in any regard.

The Commission acted arbitrarily, capriciously, and contrary to law in ordering a total forfeiture of license, since the facts considered, the decisional criteria employed, and the result reached were totally dissimilar to other comparable Commission proceedings.

The Commission acted arbitrarily, capriciously, and contrary to law in failing to grant appellant's request to adduce certain evidence.

The Commission acted arbitrarily, capriciously, and contrary to law in failing to give any credence to the Bankruptcy Act.

The Commission is required by law to decide cases before it in a similar or even-handed manner, which requirement encompasses the considerations which are deemed significant, all decisional criteria which are employed, as well as the results which are reached. In this case none of these standards were observed. The Commission in its dispositive decision and memorandum opinion and order failed to provide any explanation for its determination wherein the license of KSHO-TV was not renewed, when at the same time, it was renewing the licenses of other broadcasters who were guilty of the same type of conduct and permitting them license renewals subject to minimal fines.

The United States Court of Appeals for the District of Columbia Circuit recently considered *Melody Music, Inc., v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965) wherein it ruled that the Commission had erred in that it had not explained why it treated *Melody Music, Inc.*, different than other parties whose licenses had been renewed, notwithstanding findings of miscon-

duct. On remand and reconsideration, the Commission (FCC 66-2 26, released March 9, 1966) in an opinion ruled that the license would be renewed subject to its subsequent assignment.

In the instant case the applications which the Commission dismissed as being moot simply did the very same thing, i.e., transferred the license to one found to be a qualified broadcaster.

REASONS

1. THE COMMISSION ERRED IN THAT IT FAILED TO DECIDE THE SUBJECT CASE IN ACCORDANCE WITH THE PRINCIPLES APPLIED IN SIMILAR COMMISSION PROCEEDINGS, AND IT FAILED TO EXPLAIN THE WHOLLY DISPARATE TREATMENT ACCORDED APPELLANT.

It is a cardinal principle governing the disposition of matters before the Commission that the Commission should and must act upon comparable cases in a comparable manner. *Melody Music, Inc., (WGMA) v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965). Any Commission action or decision which contravenes this principle can properly be characterized as arbitrary, capricious, and violative of due process and fully warrants reversal, see Section 10(e)(B)(1), (2), and (4) of the Administrative Procedure Act. The Commission action under review herein does not, it is respectfully submitted, comport with this principle of elementary fairness, and is therefore contrary to law.

The requirement that the Commission decide comparable cases in an even-handed manner must, at the very least, extend to and encompass: (1) the basic factors and considerations which are accorded decisional significance; (2) the decisional criteria which are applied; and (3) the ultimate decision and result. Analysis and comparison of other recent Commission actions vividly demonstrate the inconsistent manner, in all three of the aforementioned decisional areas, in which the Commission ruled in the case at bar.

A. THE PRINCIPLE OF FAIRNESS AND THE COMMISSION'S DECISIONS IN THE MELODY MUSIC, NBC, GENERAL ELECTRIC, AND WESTINGHOUSE PROCEEDINGS.

The most recent, and particularly significant example of a Commission decision inconsistent with the subject case occurred in the proceeding involving the application by Melody Music, Inc., for renewal of license of Station WGMA, Hollywood, Florida. In that proceeding the original Commission determination that the license should not be renewed was set aside by the United States Court of Appeals for the District of Columbia Circuit and the case remanded to the Commission for reconsideration of the application. In so ruling the court emphasized that the Commission had failed to explain its different treatment of Melody Music, Inc., vis-a-vis parties whose licenses had been renewed notwithstanding findings of serious misconduct, i.e., General Electric Company, FCC 64-641, 2 Pike and Fischer R.R.2d 1038 (1964), Westinghouse Broadcasting Company, FCC 62-243, 22 Pike and Fischer

R.R. 1023 (1962), and NBC, Inc., 37 FCC 428, 2 Pike and Fischer R.R.2d 921 (1964). In the aforementioned General Electric and Westinghouse decisions the misconduct at issue involved substantial, flagrant, long-continuing, and admitted criminal violations of antitrust laws, which acts resulted in rigged and higher prices for certain equipment purchased not only by private concerns but by various governmental entities, thereby directly depriving the public of the benefits of competition and adding untold millions of dollars to the cost of providing the public and private services for which the equipment in question was employed. Notwithstanding such misconduct, the Commission, relying primarily upon the past broadcast record of *General Electric* and *Westinghouse*, renewed without qualification the multiple license of those two large corporations.

In the *NBC* decision, the misconduct at issue involved the acquisition of a valuable broadcast property by acts (i.e., the threatened withholding of network affiliation contracts) which were held in effect to constitute violations of the federal antitrust laws. Notwithstanding such serious misconduct, the Commission, again relying upon the past broadcast record of the General Electric and Westinghouse Companies, renewed the license involved with the proviso that the station be restored to its former owner.

In the *Melody Music, Inc.*, proceeding the misconduct at issue involved the rigging of national television quizz programs concerning which the principals subsequently lied to their network, their sponsor, the press, the Office of the New York District Attorney, and to

the public. Notwithstanding the grievous nature of the misconduct involved, it was difficult, if not impossible, to perceive the justification for the wholly disparate treatment between that originally accorded *Melody Music, Inc.*, and that accorded General Electric, Westinghouse, and NBC. The circuit court's remand in the Melody Music proceedings was thus manifestly correct.

Upon remand and further reconsideration, the Commission determined in effect that there was no basis in law or equity for such completely dissimilar treatment of the parties involved in the aforementioned cases, and the license of Melody Music, Inc., was renewed upon the condition that the station be assigned within sixty days thereafter. Melody Music, Inc. (WGMA), (FCC 66-226, Mimeo No. 80326, released March 9, 1966). The Commission's remand decision in Melody Music, Inc., thus concluded that renewal proceedings in substantially the same fashion as in NBC, Inc., supra (i.e., renewal conditioned upon assignment) and brought that case into a degree of conformity with the General Electric and Westinghouse decisions. In point of fact, the relief granted Melody Music, Inc., was somewhat less than that afforded General Electric and Westinghouse, whose numerous licenses were unconditionally renewed without any requirement for assignment. Yet to the extent the Commission held that Melody Music, Inc., had not forfeited its license, a ruling of considerable benefit to the applicant, the decision in Melody Music, Inc., was in accord with the General Electric and Westinghouse decisions.

B. THE COMMISSION DECISION AND ORDER UNDER APPEAL HEREIN ARE TOTALLY IRRECONCILABLE WITH THE COMMISSION'S HOLDINGS IN THE ABOVE-MENTIONED CASES.

Respondents do not challenge the results reached in the aforementioned Commission decisions. Yet it seems clear that the result ordered in the subject case is totally inconsistent with the resolution of these other Commission proceedings. Petitioners respectfully submit, this court should, as did the Circuit Court in Melody Music, Inc., v. FCC supra, remand the case for reconsideration and explanation as to why petitioners were treated differently than *General Electric, Westinghouse, NBC, Inc.*, and *Melody Music, Inc.* The Commission decision (1 FCC 2d 91, adopted July 28, 1965) under review herein and the Memorandum Opinion and Order (2 FCC 2d 31, adopted December 15, 1965) denying petitioner's petition for reconsideration are bereft of any reference whatsoever to the *General Electric, Westinghouse, NBC, Inc.*, and *Melody Music, Inc.*, decisions. This failure to explain, standing alone, constitutes error sufficient to require remand, see *Mary Carter Paint Co. v. PTC*, 333 F.2d 654 (C.A. 5, 1964); and *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).

The principle areas of Commission inconsistency between the aforementioned cases and the subject case are as follows: (1) In the *General Electric, Westinghouse, NBC, Inc.*, and *Melody Music, Inc.*, cases, the Commission held that the past broadcast records of the licensees involved should be considered and was of a

decisional significance in that commendable operation served to justify a renewal rather than forfeiture of the licenses involved. In the case at bar there was no evidence indicating that the program service provided by Station KSHO-TV had been other than commendable, yet in neither the decision nor in the order denying the petition for reconsideration does the Commission even purport to consider this factor. Moreover, when petitioners, upon their petition for reconsideration, sought an opportunity to present affirmative evidences as to the scope, character, and quality of broadcasting over KSHO-TV during petitioner Wallersteins tenure as licensee, the request was summarily denied, 2 FCC 2d 32. If past broadcast service was relevant and material in the aforementioned cases, it was just as pertinent in the subject case. Thus the Commission's failure to even consider this factor was error; the Commission's failure to explain why it ignored this factor was error; and the Commission's failure to permit appellant the opportunity to affirmatively develop this factor was also error.

The second basic area of Commission inconsistency concerns the decisional criteria employed. Thus, in its decision in Melody Music, Inc., supra, the Commission emphasized and deemed as significant the fact that the misconduct at issue did not occur and was not reflected in the operation of the station involved. The misconduct found by the Commission herein related to: (1) the failure to obtain prior consent to a transfer of stock involving the controlling interest in the corporation (Nevada Broadcasters' Fund, Inc.) which served as the holding company for the former licensee corporation (Television Co. of America, Inc.); and (2) the inaccurate reporting

of stock interests in the Fund in various documents submitted to the Commission. These acts, as unfortunate as they were, did not occur in the operation of KSHO-TV, nor did they in any way detract from the service which the station provided. Indeed, if any principal motivation emerges from the myriad of offers, counter-offers, contracts, releases, and negotiations which ensued, it was the desire to achieve financial stability at Station KSHO-TV to assure its continued operation. In any event, the conduct which the Commission found censurable did not in any way detract from the service which the licensee provided the public

If this decisional criterion was significant in the other Commission proceedings previously discussed, it was just as pertinent and controlling in the subject case. The Commission's failure to apply this criterion herein was error; as was its failure to explain why the criterion was not applied or even discussed, in the dispositive Commission orders herein.

A second decisional criterion applied in the aforementioned Commission cases but not applied here concerns the objective to be achieved in cases involving the possible loss of license. In Melody Music, Inc., supra, the Commission stressed that its objective was not punishment and that (Slip Opinion, p. 6):

> " . . . wholly to forfeit the license of WGMA would be to go beyond the principles established by the cases discussed herein and to penalize Enright and Barry without serving any statutory purpose that the Commission is authorized to serve."

The question as to whether a total loss of license rep-

resents punishment, a penalty, a sanction, or merely a determination that the license should not be renewed is largely semantic, but the impact of a forfeiture of license is unequivocal: i.e., substantial pecuniary loss to the parties involved. Recognizing this fact, the Commission viewed the controlling criterion to be that of insuring that the future operation of the station would be in the hands of fully qualified party or parties, while at the same time not invoking an action which would "... penalize." The application of this criterion thus led to the grant of renewal of the license conditioned upon its assignment.

The question thus arises as to why this same standard was not applied in the subject proceeding. If the objective is not to punish but to provide for licensees in whom the Commission has absolute confidence then the instant application of petitioner Wallerstein, for renewal of license, could have been granted subject to the condition of assignment to a fully qualified third party.[1] Moreover, the reasons for the application of this standard herein were even more compelling than in *Melody Music, Inc., supra.* In that proceeding the adverse impact of a total loss of license would at least have fallen directly upon the persons whose misconduct was at issue, whereas in this case those who suffer include many stockholders and creditors not in any

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1 During the pendency of the proceeding before the Commission a fully qualified third party (i.e. Arthur Powell Williams who was granted a radio broadcast license July 8, 1964) was available. Mr. Williams has now dismissed his appeal herein. However, petitioners are confident that a fully qualified buyer would emerge, or Mr. Williams would reconsider his position, if the Commission, on remand, were to grant renewal of KSHO-TV's license subject to its assignment to a wholly unrelated and fully qualified third party.

way associated with the conduct with which the Commission found fault.[2] There was thus no reasonable justification nor explanation for the Commission's failure to apply this standard in the subject proceeding.

Finally, the ultimate result reached in the subject case cannot be reconciled with the results in the aforementioned *General Electric, Westinghouse, NBC,* and *Melody Music* decisions. Nor did the Commission even purport to explain why such a totally dissimilar result was ordered herein. By no reasonable standard can the conduct at issue herein be deemed to be as injurious to the public as the misconduct involved in the aforementioned proceedings. By what criterion can the misconduct involved herein be held as more censurable than the deliberate rigging of prices and the thwarting of competition (*General Electric, Westinghouse*), the improper use of the power to withhold network affiliations to force an unwilling party to assign a television station in the nation's fourth largest market (*NBC, Inc.*), or the wilfull rigging of television quiz programs, which perpetrated a fraud upon millions of members of the viewing public (*Melody Music, Inc.*). There are, to be sure, differing factual situations involved, but in no two cases are the particular facts likely to be identical. The critical point is that there must be a fair and uniform application of decisional criteria. Where, as here, the Commission did not even purport to reconcile its action with that reached in the aforementioned

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2 As stated by Commissioner Lee in his dissenting statement (1 FCC 2d 97):

"However, the point here, is that 'the persons found unfit to be licensees' are long gone from the scene and only those 'persons whose conduct may be above reproach' are left — holding the bag."

cases, it is respectfully submitted that the court, as it did in *Melody Music, Inc., supra,* should remand the case to the Commission for reconsideration.

C. THE COMMISSION DECISION AND ORDER UNDER REVIEW ARE WHOLLY IRRECONCILABLE WITH THE NOBLE BROADCASTING PROCEEDING AND THE MONETARY FORFEITURE CASES.

The *General Electric, Westinghouse, NBC,* and *Melody Music* decisions have been stressed since they represent such a complete antithesis to the Commission decision under review. But those cases by no means exhaust the category of Commission actions totally at odds with its approach and conclusion herein. For example, in *The Noble Broadcasting Corp.,* 1 F.C.C.2d 154 (1965), a decision adopted the very same date (July 28, 1965) as the decision under review herein, the Commission held that it would not forfeit the license of Station WILD, Boston, Massachusetts, notwithstanding its conclusions that the licensee had committed numerous violations of the Commission's rules and policies and of the Communications Act, including the broadcast of matter publicizing a lottery, lack of adequate control over foreign language programming, failure to file time-brokerage contracts, failure to follow the station's policy on the number of commercials broadcast, and "numerous misstatements to the Commission . . . " [3]

The rationale of the Commission's decision in *The Noble Broadcasting Company* proceeding was that the

3 The Commission also found that the licensee had twice failed to remit withholding taxes and this reflected adversely upon his qualifications.

licensee's derelictions had, in large part, resulted from a "virtually bankrupt condition."[4]

Yet in the case under review the Commission refused to give any weight to the financial circumstances of the parties involved. Indeed, the Commission even refused to attach any decisional significance to the fact that the applicant for renewal of license of Station KSHO-TV was a Receiver in Bankruptcy. Moreover, the Commission did not give any weight to the precarious financial condition which prevailed at KSHO-TV during the time the conduct with which the Commission found fault occurred. If the finanical condition of the station was relevant and material in *The Noble Broadcasting* proceeding, it was just as pertinent herein and the Commission's failure to consider this factor and its failure to explain why it was not considered, constitute error.

Additionally, it should be emphasized that a substantial part of the misconduct, i.e., broadcast of material publicizing lotteries, failure to adequately control for-

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4 The initial decision (1 F.C.C.2d 161, 211) in The Noble Broadcasting Company proceeding contains an interesting statement as to the significance in cases of this kind of the aforementioned General Electric, Westinghouse and NBC decisions:

"In considering the means by which Noble has kept station WILD on the air, it must be kept in mind that his were the acts of necessity—not the acts of a multimillion dollar corporation which, for greater profit, used its gigantic financial power and the economic power of its network to force its will upon a less fortunate competitor, which acts the Commission found not to be in the public interest. See paragraphs 37 & 38 of National Broadcasting Company, Inc., et al. (1964) (F.C.C. 64-710), 37 F.C.C. 427, 2 R.R.2d 921.

"The Commission's files establish that within the period of time covered by the testimony in this record, the Commission has renewed the licenses of several multimillion dollar licensee corporations which after pleading "nolo contendre," were found guilty of having violated the antitrust laws of the United States by engaging in illegal acts which enabled the licensee corporations to reap exorbitant profits by overcharging and defrauding numerous agencies of Federal, State, and municipal governments."

eign language programming, and failure to observe the station's policies on number of commercial announcements) in *The Noble Broadcasting* proceeding occurred in the operation of the very station involved. Yet, the license was not forfeited. The contrast between the criteria applied and the result reached in the aforementioned case and that employed herein (where there was not misconduct in the operation of the station) is obvious. The Commission's totally disparate treatment of the subject case, and its failure to explain, again constitute error.

Also to be considered are the numerous Commission proceedings, where the factual circumstances were substantially similar to those present here, but where the Commission imposed monetary forfeitures only. A list and summary of such proceedings is submitted herewith as Appendix C. The proceedings cited in Appendix C involved violations of Section 310(b) of the Act, failure to file ownership reports and/or the filing of false or inaccurate applications and reports. Moreover, the misconduct involved in the proceeding listed in Appendix C was extensive. For example, in the *Lee Broadcasting Company* proceeding (Report No. 5272, Mimeo No. 58458, released October 22, 1964) the Commission moved to fine the licensee of Station WTUP, Tupelo, Mississippi, for:

> "... effecting two unauthorized assignments of license and submitting numerous related applications, ownership reports and correspondence containing false information with respect to ownership of that station."

The Commission found that during a seven-year

period the licensee had made representations to the Commission concerning ownership in no less than sixteen WTUP applications, amendments, letters, and ownership reports. In addition, the ownership of WTUP was also misrepresented in twenty-four other applications and ownership reports submitted to the Commission on behalf of other stations in which one of the principals of Lee Broadcasting had interests. Notwithstanding such misconduct, the Commission renewed (without even requiring a hearing) the license of WTUP for one year and imposed a $5,000 forfeiture. By what reasonable standard can the conduct at issue herein be deemed more censurable than that involved *in Lee Broadcasting, supra.* The Commission, to be sure, has certain amount of discretion as to the sanctions to be applied, but that discretion is not unlimited. And where, as here, the sanction imposed is so wholly disproportionate to that imposed in another similar case, the Commission, as a minimum, should be required to explain and justify its differing results. The Commission Orders under review do not even attempt to make such an explanation and this failure constitutes error.

2. THE COMMISSION ERRED IN REFUSING APPELLANT'S REQUEST TO PERMIT THE ADDUCTION OF CERTAIN EVIDENCE.

The Commission also erred in refusing appellant's requests to reopen the record to permit: (1) the adduction of evidence concerning the scope, quality, and nature of the commendable broadcast service provided

over Station KSHO-TV; and (2) the adduction of testimony by Maurice R. Barnes, formerly attorney for Broadcasters' Fund, concerning the preparation of certain of the documents and reports in question.

As previously stated, the past broadcast record of the licensees involved was viewed by the Commission as being of paramount decisional significance in the aforementioned *General Electric, Westinghouse, NBC,* and *Melody Music, Inc.,* decisions. Yet, here the Commission summarily rejected appellant's plea to affirmatively present such evidence. The resultant gap in the record relating to almost relevant and material area of proof fully warrants remand to the Commission in order that such evidence may be adduced, cf. *WMOZ, Inc. v. FCC,* 120 U.S. App. D.C. 103, 344 F.2d 197 (1965).

The second major gap in the record under review relates to the absence of testimony by attorney Barnes. The Commisson denied the request to adduce such testimony on the ground that (2 F.C.C..2d 32): "This guilt cannot be attributed to their attorney." This ruling clearly constitutes a prejudgment as to the nature and significance of the testimony sought to be adduced. Until the particular facts had been established, the Commission had no reasonable basis to justify foreclosing appellant from presenting such evidence cf. *WMOZ, Inc. v. FCC, supra.*

Finally, it bears emphasizing that the result ordered herein, i.e., the total forfeiture of license, is the most severe sanction which may be imposed by the Commission. Such sanctions should be in order only

for the most compelling reasons, *Churchill Tabernacle v. FCC*, 81 U.S. App. D.C. 411, 160 F.2d 244 (1917). Moreover, in cases involving the possible loss of license the Commission should be obligated to scrupulously observe the requirements of due process, particularly the even-handed application of decisional criteria. The Commission orders and actions under review herein obviously breach these standards and should therefore be reversed.

3. THE COMMISSION ERRED IN CONCLUDING THAT AN UNAUTHORIZED TRANSFER OF CONTROL OF STATION KSHO-TV HAD OCCURRED.

The record is uncontradicted that Alex Gold was general manager of KSHO-TV from the fall of 1958 up to and including the time that Receiver Wallerstein was appointed. The actions of Maxfield and the Johnson group as they pertain to KSHO-TV have been entirely limited to that of creditors. They did no more, and probably no less, than any banker or financial institution might have done in order to protect an investment. Their conduct was calculated to prevent financial loss and to date only Maxfield has been successful. In the case of KBLI the money used by Johnson was public money of investors in the State of Idaho. Johnson in discharging his duties to his shareholders in Idaho found himself on the horns of dilemma: how to terminate the contract with Maxfield without suffering substantial loss and to expeditiously comply with the Idaho Securities Commissioner's directions.

Admittedly, the direction or application of funds

provided by a lender to a creditor is not unusual or unreasonable and is, in fact, the common practice throughout the business community in the United States.

KBLI in following its communications counsel's advice to sell and to give him a listing agreement was at least one way to avoid litigation and not suffer financial loss and yet comply with the Idaho Commissioner's order. KBLI's good faith in deciding to follow advice of counsel can't be seriously questioned. The fact that Maxfield continually interfered could not be foreseen in light of his representation that he would be cooperative.

The record clearly demonstrates that there was no actual or effective control of KSHO-TV exercised by KBLI. It simply can't be said that a firm in lending amounts of cash to keep a business alive while trying to sell out its interest is controlling that business when it does not assume or direct any management functions.

What did happen at KSHO-TV so far as KBLI actually exercising control?

Anderson received authority by the Fund at a special directors' meeting to enter in the daily management of KSHO-TV by way of approving capital expenditures and the writing of checks. However, in fact, he was merely delegated by Gold to collect delinquent accounts, which he did for less than a month. In fact, the record indicates that the Johnson group could not and did not enter into any management function at KSHO-TV. Maxfield and the Johnson group did nothing except furnish capital which had nothing

to do with the actual daily operation or control of KSHO-TV.

It is submitted that the definition of the word "control" as used in Section 310(b) of the Communications Act requires the usual, ordinary and everyday use we all attach to it, i.e., govern, regulate, guide, authority, power, administration of business activities. In fact in *Heitmeyer v. FCC*, 96 F.2d 91, the court gives lip service to the general proposition that a creditor can control a debtor's business through controlling finances. However, this would seem to mean total or substantial control of the debtor's finances. In the instant case, Gold merely advised Maxfield and KBLI who required payment, and they paid the money directly to the creditors. KBLI or Maxfield simply did not control KSHO-TV for no attempt was made to control the cash flow, accounts receivable, accounts payable, salaries, bonuses of employees, set station policies or to fix programming. In good conscience, reasonable men cannot conclude that the operation of KSHO-TV was carried on by anyone other than its general manager, Alex Gold, during the period in question.

4. THE ACTS OF THE SHAREHOLDERS OF A LICENSEE CORPORATION SHOULD NOT BIND THE CORPORATION A FORTIORI TO RENDER THE LICENSEE CORPORATION LIABLE FOR THEIR ACTS OR OMISSIONS.

The Johnson group acting independently or as officers of KBLI were never directors or appointed officers of the Fund or TCA, consequently, their acts,

so far as they pertain to be within the jurisdiction of the Commission, must arise out of being officers and directors of other licensee broadcasting corporations. These men never undertook to represent TCA, the Fund, or KSHO-TV; and had they chosen to do so, they would have been acting without authority, and the subject corporation would not be liable for their actions, with the possible exception of Anderson. It is elementary corporation law that a shareholder may not bind his corporation in a contract or act for it in any regard. Corporate business must be transacted through duly elected officers by the board of directors who are, in turn, elected by shareholders. The record in this action is barren of any corporate activities undertaken through the Johnson group for the Fund, TCA, or KSHO-TV. The acts of the Johnson group were for their own interests, not for the interest of KSHO-TV. If the Johnson group or KBLI failed to report their activities concerning KSHO-TV as they should because of holding other broadcast licenses, then the Commission should bring them to task directly. In short, and specifically referring to Broadcast Exhibit 12, wherein the Commission received answers from the Johnson group it felt were deceitful; these were not acts or omissions of KSHO-TV or its agents but of minority stockholders of the Fund.

The action of the Commission in cancelling KSHO-TV's license punishes innocent stockholders, frustrates a successful reorganization of TCA under the Bankruptcy Act, wipes out thousands of dollars of creditors who would be otherwise paid, destroys a going business and deprives the public in Las Vegas, Nevada, of a

third station, while the real wrongdoers who hold several broadcast licenses are penalized by losing their relatively insignificant investment in the Fund (approximately $6,250.00).

5. THE APPLICATION FOR TRANSFER OF CONTROL TO WILLIAMS WHEREIN MAXFIELD AND HULBERT WERE SHOWN AS TRANSFERRING 37,500 SHARES OR MAJORITY CONTROL DID NOT CONSTITUTE FRAUD.

The Commission must support its findings that fraud was practiced upon the Commission by looking to what is usually and ordinarily required to be shown to support such a charge. The elements of fraud or deceit are as follows: (1) A representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity and (7) his reliance on the truth and approximate injury (See 37 CJS 215). The Commission claims the greatest fraud perpetrated upon it is in "the Fund in the application for transfer of control to Williams, wherein Maxfield and Hulbert are shown as transferring 37,500 shares, or majority control, while the facts show that KBLI was the real owner of said stock and had been since March, 1960, . . . " (Finding 63, page 63; R. 1489-1552). The record utterly fails to support this finding. In fact, the following facts are uncontroverted by the record.

1. The contract of March 8, 1960, between KBLI and Maxfield, wherein KBLI was to acquire the control of KSHO-TV was believed to be on file with the Commission (Wall. Ex. 1).

2. Exhibit 1, to the very application in which the transfer of control to Williams was requested sets forth that the parties; namely, KBLI and Maxfield, entered into an agreement on the 8th day of March, 1960, wherein Maxfield agreed to sell and KBLI agreed to buy 32,500 shares of Fund Common stock and that said contract was not fully consummated. The Exhibit goes on to set forth in its first paragraph that "Maxfield was the owner of the subject stock." The Exhibit taken in its entirety provides that the money shall go to KBLI, that upon the approval of the transfer of control to Williams by the Commission, that the stock held in escrow should be delivered to Williams, and this authorization is specifically made by Hulbert and Maxfield. It is quite apparent that if the Fund in its application wished to deceive the Commission as to the March 8, 1960, agreement that it would not have made reference to it in an exhibit to the Commission. In fact, the disclosure of the March 8, 1960, agreement was so obvious in the application for transfer of control to Williams it is impossible to honestly understand how one could claim fraud was being practiced on the Commission.

Further, the element of intent is missing, for the application was prepared under the direction of Washington Federal Communications counsel. It must be remembered that this counsel had, in fact, suggested the method of KBLI solving its dilemma with Maxfield

and its partially completed contract by suggesting that a third person buy out the interests of KBLI and Maxfield. Counsel, in fact, took a listing agreement whereby he could find a buyer for the controlling stock of KSHO-TV in one of his clients or some third party (Gold, Exhibit 7). In fact, Washington counsel felt a sufficient disclosure was made to the Commission; or if there be doubt on this point, the record should be opened for direct testimony from the attorney. As a practical matter, the stock was in the name of Maxfield and Hulbert, it had never been transferred from their names on the books of the corporation, and to give some resemblance to continuity of the stock ownership it would require that Maxfield and Hulbert, in fact, give instructions to have the stock transferred and delivered to the ultimate owner which, in fact, was Williams and not KBLI. These instructions were part of the terms and conditions of Exhibit 1, filed with the transfer application.

The unfulfilled contract between Maxfield and KBLI is of little importance in light of facts and actions of the parties. KBLI had executed an agreement it could not keep, performance was impossible. Maxfield agreed to change the terms of the written agreement. Neither party knew what would ultimately happen except the written agreement entered into would have to be altered in some material way. Working things out was a novation of the March 8, 1960, agreement. The legal consequence of a novation is to make the original agreement a nullity and the rights of the parties are governed solely by the new agreements (*Eckart v. Brown,* 93 P. 2d 121, 34 Cal. App. 2d 182). Conduct

is sufficient form for the basis of a novation, although there is no express writing or agreement; (*Sylvia v. Providence Hospital of Oakland,* 97 P. 2d 798, 14 Cal. 2d 762).

The rights of Maxfield and KBLI were not known until Williams agreed in June of 1961 to buy their respective interests as encompassed in Exhibit 1, appended to the application.

There could be no fraud or deceit practiced on the Commission, for the parties related the events that transpired, and Maxfield had a property interest in the stock until he was paid by Williams.

The elements to support a charge of fraud are missing.

THE BANKRUPTCY STATUTES ARE PARAMOUNT TO ADMINISTRATIVE AGENCY REGULATION, AND ADMINISTRATIVE AGENCIES SHOULD GIVE THEM FULL FORCE AND EFFECT EXCEPT WHEN TO SO DO WOULD BE TO VIOLATE THE VERY PURPOSE FOR WHICH THE ADMINISTRATIVE AGENCY WAS CREATED.

The Commission has a duty to harmonize its actions with the rehabilitation of TCA through the United States District Court for the State of Nevada under Chapter XI of the Bankruptcy Act. To do so in the instant case would have paid due deference to the supremacy of the Bankruptcy Laws (See *New York*

v. Irving Trust Company, 288 U.S. 329, 77 L. Ed. 815, 53 S. Ct. 389; *Stratton v. New,* 283 U.S. 318, L. Ed. 1060, 41 S. Ct. 465; U.S. Const. Art. I par. 8 cl. 4). The Commission in failing to harmonize its actions with due regard to the Bankruptcy Act and the rehabilitation of TCA has not materially protected its own processes, but, in fact, has destroyed valuable property rights. Public interest is not served by inflicting extreme financial loss upon persons who are in no way connected with the alleged violations of the Commission's Rules and Regulations. In particular, the following financial loss is precipitated by the Commission's action in this matter to the following persons:

(a)	Mervyn and Nathan Adelson, et al.	$115,000.00
(b)	Frank Oxarat, et al.	25,000.00
(c)	KBLI, Inc., a public corporation with approximately 500 shareholders	53,000.00
(d)	Approximately 50 stockholders of the Nevada Broadcasters' Fund holding stock or bonds in the Fund with accrued interest due	34,000.00
(e)	Other minor stockholders in the Fund with investments totaling	8,750.00

The public interest is not served by KSHO-TV going black and severing its business relationships with the many firms and persons with whom it does business. In this regard, the Commission should recognize the valuable rights and investments of the public as set forth in *Churchill Tabernacle v. FCC,* 81 U.S. App. D.C. 411, 160 F. 2d 244 (1947). This case sets forth a simple standard for the Commission to recognize, namely:

> "For an ordinary fairness, the Federal Communications Commission, no less than the Federal Trade Commission, owes the duty to exhaust all possible avenues with compliance with congressional purpose before requiring complete destruction of the private interest."

In the instant case, the Commission has not followed this requirement, for the transfer of control to Williams will not benefit alleged wrongdoers. The Commission has ample processes to deal with the other alleged wrongdoers in this matter, for they hold several broadcast licenses. The Commission can reach the Johnson group and KBLI directly if it so chooses by penalizing them or taking other appropriate action. In fact, the Commission's action in cancelling KSHO-TV's license does not achieve the effect sought; namely, to punish the Johnson group. In fact, it does just the opposite, the Johnson group per se have an extremely small investment involved in KSHO-TV as compared to their other broadcast interests. They will not personally be materially affected by Commission action. On the other hand, KBLI, which is publicly owned corporation with hundreds of stockholders, suffers an extreme financial loss of thousands of dollars. The processes of the Commission should be simply aimed in the direction where they will be effective and accomplish the purposes they purport to achieve in this proceeding. In this case their action does not materially harm or injure any person who, they allege, have been guilty of violating their rules and regulations. Only the innocent shareholders of the Fund and the principal creditors of KSHO-TV are injured.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari ought to be granted.

Respectfully submitted,

MADISON B. GRAVES
ROBERT W. HUGHES

Suite 1101 Newrouse Building
Salt Lake City, Utah

Attorneys for Petitioners

Harry Wallerstein, Receiver
Alex Gold
Robert W. Hughes

APPENDIX A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

September Term, 1965

No. 19,904

Harry Wallerstein, Receiver of Television Company of America, Inc., Appellant,

v.

Federal Communications Commission, Appellee.

No. 19,905

Alex Gold and Robert W. Hughes, Appellants,

v.

Federal Communications Commission, Appellee.

On Appeals from an Order of the Federal Communications Commission.

Before: Bazelon, Chief Judge, and Danaher and McGowan, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeal from the Federal Communications Commission, and were argued by counsel.

These appeals are from orders of the Federal Communications Commission which denied an application for renewal of a license of a television station, dismissed

applications for consent to assign that license and to transfer the control of the licensee, and denied reconsideration of the Commission's decision and leave to open the record to adduce further evidence. Appellants urge us to set aside the orders and remand for an explanation from the Commission as to why the disposition of this renewal application varied from that of others which are claimed to have involved similar circumstances. See *Melody Music, Inc. v. FCC,* 120 U.S. App. D.C. 241, 345 F.2d 730 (1965). Since this claim of disparate treatment was not made to the Commission, however, although an opportunity for doing so under *Melody Music, supra,* was available, it cannot be considered now. *Florida Gulfcoast Broadcasters v. FCC,* .... U.S. App. D.C. ...., 352 F.2d 726 (1965); *Albertson v. FCC,* 100 U.S.App.D.C. 103, 243 F.2d 209 (1957); *Democrat Printing Co. v. FCC,* 91 U.S.App. D.C. 72, 202 F.2d 298, 303-04 (1952).

On consideration whereof it is ORDERED and ADJUDGED by this Court that the orders of the Federal Communications Commission appealed from in these cases be, and they are hereby, affirmed.

Per Curiam

APPENDIX A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

September Term, 1965

No. 19,905

Alex Gold and Robert W. Hughes,

Appellants,

v.

Federal Communications Commission,

Appellee.

Before: Bazelon, Chief Judge, and Danaher and McGowan, Circuit Judges, in Chambers

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the court that appellants' aforesaid petition is denied.

Per Curiam

APPENDIX B

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

DOCKET NO. 15006 - File No. BRCT-397

In re Applications of

HARRY WALLERSTEIN, RECEIVER, TELEVISION COMPANY OF AMERICA,

For Renewal of License of Station KSHO-TV, Las Vegas, Nevada

DOCKET NO. 15007 - File No. BALCT-181

HARRY WALLERSTEIN, RECEIVER, TELEVISION COMPANY OF AMERICA, INC.
(ASSIGNOR)

and

TELEVISION COMPANY OF AMERICA, INC.
(ASSIGNEE)

For Assignment of License of Station KSHO-TV, Las Vegas, Nevada

DOCKET NO. 15008 - File No. BTC-3965

REED R. MAXFIELD, ROBERT W. HUGHES, CARL A. HULBERT AND ALEX GOLD
(TRANSFERORS)

and

ARTHUR POWELL WILLIAMS
(TRANSFEREE)

For Transfer of Control of Nevada Broadcasters' Fund, Inc., Holding Company of Television Com-

pany of America, Inc., Licensee of Station KSHO-TV, Las Vegas, Nevada

Appearances

Robert Coll on behalf of Harry Wallerstein, Receiver, Television Company of America, Inc., and Arthus Powell Williams; *Reed Maxfield* on behalf of self; Robert W. Hughes on behalf of self, and on behalf of Carl A. Hulbert and Alex Gold; and *Robert B. Jacobi* and *William Kehoe, Jr.*, on behalf of the Broadcast Bureau, Federal Communications Commission.

DECISION

By the Commission: Commissioner Hyde absent; Commissioner Lee dissenting and issuing a statement; Commissioner Cox not participating.

1. The history of this proceeding is set forth in the Initial Decision of Hearing Examiner Millard F. French (FCC-64D-73; Mimeo No. 59533; released November 12, 1964) which we find to be substantially accurate and will not be repeated. The general nature of the proceedings involves an application for renewal of license of television Station KSHO-TV, Channel 13, Las Vegas, Nevada, by Harry Wallerstein, Receiver in Bankruptcy for Television Company of America, Inc., the station licensee (but for an involuntary assignment of license to the receiver concurrent with the bankruptcy); Wallerstein's application for assignment of the renewed license (if it be renewed) back to Television Company of America, Inc.; and an application for transfer of control of Nevada Broadcasters' Fund, Inc. (the company holding of the majority of the stock of Television Company of America, Inc.) from four named transferors[1] to Arthur Powell Williams.

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1 While their names appear in the caption, the Initial Decision found that Maxfield and Hulbert have no interests to transfer. We concur.

2. The applications were placed in hearing on designated issues (see par. 3, Initial Decision) because of various possibilities of unauthorized transfers of control of the licensee corporation or KSHO-TV and/or the holding company thereof, and a number of irregularities in filing, failing to file timely, failure to file at all, and filing erroneous contracts, ownership and other reports pertaining to the various entities involved. The Initial Decision would deny the applications. Exceptions thereto were filed by counsel for Wallerstein and Williams, and by Robert W. Hughes, *pro se*.[2] Replies were filed by the Chief, Broadcast Bureau. Oral argument was held on July 9, 1965, before the Commission, *en banc*.

3. We have examined the Initial Decision in the light of the records, the exceptions and briefs, and the arguments of the parties. Our rulings on exceptions are contained in the Appendix, attached hereto. Except as modified by such rulings, we adopt the examiner's findings of fact and conclusions and incorporate them by reference as fully as if set forth at length herein.

4. No party has seriously taken issue with the findings which are long and tortuous. The exceptors have challenged the legal effect to be given thereto in a limited number of aspects. They contend that we should look to the conduct of Wallerstein, the receiver who has operated the station in a satisfactory manner for approximately three years; that he is the real licensee in law and in fact and is entitled to renewal of the license despite wrongdoing, if any occurred, by others from whom he derived his license. These exceptors argue alleged wrongdoers are for the most part now beyond the reach of our process (e.g., Reed Maxfield has no legal or financial connection with the licensee, and renewal or failure to do so cannot affect him in the least), and we should not punish the present licensee

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2 Although Robert W. Hughes, an attorney at law, appeared for himself, Hulbert and Gold, transferors, during the hearing, he filed exceptions and argued orally only for himself.

for the misdeeds of the past. The exceptors contend that our failure to renew the license will damage without just cause many small public stockholders and innocent creditors; that the great bulk of misstatements and concealments in reporting the stockholdings of KBLI, Inc., were the result of honest confusion and misunderstanding of the law as to where ownership of such stock resided; that renewal of the license will confer no benefit on the wrongdoers; that renewal of the license will obviate many lawsuits involving those same wrongdoers; and that failure to renew the license will frustrate the reorganization by the bankruptcy proceeding. Finally, we are asked to consider the blameless character of the proposed transferee, Arthur Powell Williams, and the benefits to the public to be derived from continuing the operation of an existing station under his aegis.

5. We have already considered and rejected the argument that Wallerstein, Receiver, is to be considered the licensee in law and in fact and that the Commission should not look beyond his qualifications in passing upon the renewal application. As we said in our Memorandum Opinion and Order of October 1, 1964 (FCC 64-899) in this proceeding:

> Petitioners also ignore the fact that Wallerstein is the licensee of KSHO-TV solely because of the fact that he was appointed Receiver by the U. S. District Court, District of Nevada, in the voluntary bankruptcy proceeding involving TCA. When Wallerstein was appointed Receiver, TCA was authorized to remain in possession to operate the station. Thus, a Receiver as a licensee cannot be considered in the same category as other licensees during renewal proceedings. Commission policy regarding renewal applications filed by trustees or receivers is well established. Grant of a license to a trustee or receiver by its very nature is temporary, and action on applications for renewal of licenses filed by such trustees or receivers is de-

ferred until an asignee has been found, an application for assignment of a license has been filed, and the qualifications of the assignee have been considered. Petitioners point to no case where the license of a receiver was renewed without a qualified assignee being present at the same time. Since Wallerstein has filed an application to assign the license, after renewal, back to TCA it is axiomatic that TCA's qualifications must be considered concurrently with the renewal application.

6. Throughout exceptor's arguments there is the recurring theme that failure to renew the license herein will "punish" certain creditors, stockholders and employees, who were innocent of any wrongdoing, yet will fail to punish those individuals who have already disposed of their interests and who will not be affected regardless of the disposition of these proceedings. They contend that since the object of the proceeding (i.e., punishment) cannot be achieved, or, if achieved, will affect the wrong persons the entire matter should be terminated. This contention was considered and rejected in WOKO,[3] where the Supreme Court stated:

> It also is contended that this order inflicts a penalty, that the motive is punishment and that since the Commission is given no powers to penalize persons, its order must fall. We think it unnecessary to indulge in the exposition of what a penalty is. It is enough to decide this case to know what a penalty is not. A denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure. It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact.

While the consequences to innocent persons may be unfortunate, it is a fate common to many who associate themselves in business enterprises with persons

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3 WOKO v. FCC, 329 U.S. 223 at 228, 91 L.Ed. 204, 67 SCt. 213 (1946).

who are lacking in the affirmative qualifications necessary to be a broadcast licensee. Conversely, persons found unfit to be licensees should not be allowed to continue to hold their licenses by associating themselves with persons whose conduct may be above reproach.

7. While the Initial Decision sets forth at length many erroneous filings, failures to file, and late filings, and our examination of the whole record convinces us that many of these instances were the result of the almost incredibly lax manner in which the affairs of the business entities involved were conducted,[4] outstanding and willful in our opinion (and we so conclude) was the concealment of the ownership interest in Nevada Broadcaster's Fund, Inc. by KBLI, Inc. The argument advanced by exceptors that the acquisition of the stock interest by KBLI, Inc. was executory, that no one really knew who owned the stock, etc. and thus that the Commission was not informed of the transfer is belied (see Findings 95-103 of the Initial Decision) by the fact that reports and documents filed with the Securities and Exchange Commission quite clearly stated that the stock in issue was owned by KBLI, Inc., while reports being filed contemporaneously with this Commission made no mention of this fact. The Commission's rules make ample provision for (indeed require) the reporting of executory contracts, beneficial ownerships, and other interests. Had the reporting officials endeavored to keep the Commission apprised of the true state of the licensee's ownership situation, there would have been little difficulty in so doing. In cases of honest confusion a full disclosure of the facts with the statement that the legal consequences were uncertain would have been sufficient. Instead, there was no disclosure and the application for transfer of control now before us (BTC-3965; Docket No. 15008) represented Maxfield and Hulbert as owners of stock in which they had long since ceased

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4 See our comments on "minimum effort to ascertain facts and minimum disclosure of such facts as are ascertained" in **Publix Television Corp.**, 36 FCC 1215 at 1221 (1964).

to have any interest, legal or beneficial. We cannot escape the conclusion (Initial Decision, Finding 72) that because Hughes believed that the Commission would not approve a transfer of control to KBLI, Inc. (although such transfer had in fact already occurred), a policy of deliberate concealment of the KBLI, Inc. interest was initiated and maintained.

8. Insofar as the argument that renewal of the license will confer no benefits on the wrongdoers is concerned, even if such claim is true, it has no relevance to our proceedings. While we recognize perforce that our disposition of applicatoins benefits some and inures to the detriment of others, we cannot permit such results to become the touchstone of our decisions. Our processes are intended to make grants when such will be in the public interest, and withhold them when we find the contrary to be true. Individual benefits and detriments have no place in such a balancing. By the same token we cannot consider lawsuits which may ensue as a result of our decision here. This Commission is not the forum in which to try such lawsuits.

9. Exceptors have also brought to our attention that a failure to renew this license will frustrate a successful reorganization in bankruptcy by the District Court. *Ideally, of course, the actions of this Commission and those of the District Court should harmonize.* The mere fact, however, that the Court has achieved a successful business reorganization has no real bearing on the question before us, i.e., whether the licensee is fit to qualify for license renewal. In sum, we cannot renew the license of an unfit licensee merely because the District Court has rendered it viable financially.

10. The apparently blameless character of the proposed ultimate transferee of control of Nevada Broadcasters' Fund, Inc., and, in turn, Television Company of America, Inc., is likewise irrelevant to the disposition of this proceeding once we have arrived at an adverse determination concerning the application for license renewal. If there is a failure to renew the license

of KSHO-TV, Wallerstein will have no license to assign.[5] There is nothing to prevent Arthur Powell Williams from applying directly for the channel which will become vacant as a result of our action. If he be the best applicant, he will prevail. The qualifications of Mr. Williams as a prospective broadcast licensee (and nothing adverse to him appears on our record) are not, however, a reason for by-passing the orderly processes of license renewal.

11. Exceptors argue that Williams stands ready to make substantial investments and improvements in KSHO-TV, as well as continuing an existing service. To treat the second point first, from our experience we have little fear that a vacant channel in Las Vegas, Nevada, will remain dark for long. As far as the promised improvements are concerned, we likewise have little doubt that Williams can procure the unused facilities of KSHO-TV at their fair market value or, failing that, erect new and better ones should he be the successful applicant.

12. In conclusion, we find no error in the Initial Decision here under examination.

Accordingly, IT IS ORDERED, This 28th day of July, 1965, that, the application of Harry Wallerstein, Receiver, Television Company of America, Inc., for renewal of license of Station KSHO-TV, Las Vegas, Nevada, Docket No. 15006, BE, AND THE SAME IS, HEREBY DENIED; that the application of Harry Wallerstein, Receiver, Television Company of America, Inc., Assignor, and Television Company of America, Inc., Assignee, for assignment of license for Station KSHO-TV, Las Vegas, Nevada, Docket No. 15007, BE, AND THE SAME IS, HEREBY DISMISSED; and *the application of Reed R. Maxfield, Robert W. Hughes, Carl A. Hulbert and Alex Gold, Transferors, and Arthur Powell*

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5 Jefferson Radio Company, Inc. v. FCC (C.A.D.C. - 1964) .. U.S. App D.C. .., 340 F.2d 781, 2 RR 2d 2090.

Williams, Transferee, for transfer of control of Nevada Broadcasters' Fund, Inc., holding company of Television Company of America, Inc., licensee of Station KSHO-TV, Las Vegas, Nevada, Docket No. 15008, BE, AND THE SAME IS, HEREBY DISMISSED; and

IT IS FURTHER ORDERED, That Harry Wallerstein, Receiver, Television Company of America, Inc., (KSHO-TV), cease operation and that his authorization terminate September 26, 1965; *Provided*, That in the event a petition for reconsideration of the Commission's decision or an appeal from such decision is timely filed, Harry Wallerstein, Receiver, Television Company of America, Inc., (KSHO-TV), shall cease operation and his authorization shall terminate 60 days after denial of the petition for reconsideration and/or the judicial affirmance of the Commission's decision.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple, Secretary

Attachment

Released: July 29, 1965

*See Attached Dissenting Statement of Commissioner Lee.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent. I think the zeal of the Commission in protecting its processes for the sake of consistency is misplaced in this case.

Here we have an application for one Wallerstein, Receiver in Bankruptcy, for renewal of license of television station KSHO-TV; an application for assignment of license from Mr. Wallerstein to Television Corporation of America (former licensee, reorganized in bankruptcy); and, an application for transfer of control of Nevada Broadcasters Fund, Inc. (Parent of Television Corporation of America) to Mr. Arthur Powell Williams.

A voluntary petition in bankruptcy of the former licensee contemplated, under District Court supervision, reorganization rather than liquidation. Under the Court's supervision, the reorganization appears to have been accomplished successfully, and since 1961 the Receiver has been operating the station in the public interest. The proposed assignee, Mr. Williams, would continue to do so.

I have considered the record very carefully and I cannot find any ulterior motive for the various deeds and misdeeds in this case which are best described as an amazing coincidence of stupidity, carelessness, and just plain negligence on the part of principals and others that are no longer in the picture. Even if the motives of some were nefarious, the decision of the majority does not reach them since only the "good guys" remain to suffer the consequences.

I certainly cannot quarrel with the doctrine spelled out by the majority that " . . . persons found unfit to be licensees should not be allowed to continue to hold their licenses by associating themselves with persons whose conduct may be above reproach." However, the point here is that the "persons found unfit to be li-

censees" are long gone from the scene and only those "persons whose conduct may be above reproach" are left—holding the bag.

Pursuant to the decision of the majority we can look forward to another round of multiple hearings and years of litigation. Meanwhile the station may "go dark" or at best struggle along under some kind of interim operation that cannot supply the effective competition that is expected from a regular licensee. Thus, it seems to me that the Commission is beating the public over the back as well as those persons that stand ready, willing and able to take over the operation of the station, in order to protect some "processes" that were violated by persons not reached by the majority decision.

APPENDIX C

Station & Location	Principal Allegation	Fine or Action
WRVB Madison, Wis.	Unauthorized transfer of control	$1,000.00
WVAL Sauk Rapids, Minn.	Unauthorized assignment of license	100.00
KATT-(FM) Woodland, Calif.	Series of unauthorized assignment of license	500.00
KVWO & KVWO-(FM) Cheyenne, Wyo.	Unauthorized transfer of control	1,000.00
KBGO Waco, Texas	Unauthorized transfer of control and other violations (Order & Notice of Apparent Liability)	1,500.00
KQCY Quincy, Calif.	Unauthorized transfer of control and other violations (Memo Opinion & Order & Notice of Apparent Liability)	500.00
WKYX & WKYX-(FM) Paducah, Ky.	Unauthorized assignment of license	500.00
KMWC Midwest City, Okla.	Unauthorized assignment of license	1,000.00
KHEY El Paso, Tex.	Unauthorized transfer of control and failure to report ownership changes	1,000.00
WKBL Covington, Tenn.	Unauthorized transfer of control; one partner was involved in the unauthorized control of Station WHEY	Renewal granted
WUNS Lewisburg, Pa.	Misrepresentation; unauthorized transfer of control	License renewed for 1 year 5-23-62
WILD Boston, Mass.	Misrepresentations to the Commission and lack of candor	Renewal granted
WTUP Tupelo, Miss.	Numerous violations of Section 310(b) of the Act and the Commission's rules relating to ownership reports	5,000.00
WCOY Columbia, Penn.	Failure to file ownership report giving changes in ownership and control	100.00
KGKB Tyler, Texas	Violations of Section 310(b) of the Act	2,500.00

KRIZ Phoenix, Arizona	Failure to report transfer of control and changes in the officers and directors	1,000.00
KCIN Victorville. Calif.	Willful and repeated violations of Section 310(b) of the Act and Commission's Rules relating to ownership reports	2,000.00

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3 Davis, *Administrative Law Treatise*, § 20.06 (1958)	9

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 791

HARRY WALLERSTEIN, RECEIVER OF TELEVISION COMPANY OF AMERICA, INC., ALEX GOLD AND ROBERT W. HUGHES, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The *per curiam* order of the court of appeals (Pet. App. i-ii) is unreported. The hearing examiner's initial decision (J.A. 13-108)[1] is reported at 5 Pike & Fischer R.R. 2d 821. The decision of the Federal Communications Commission (J.A. 270-281; Pet.

[1] "J.A." refers to the joint appendix in the court of appeals.

App. iv-xiv) is reported at 1 F.C.C. 2d 91. The Commission's memorandum opinion and order denying petitions for reconsideration, rehearing, and to open the record (J.A. 307-315) are reported at 6 Pike & Fischer R.R. 2d 506.

JURISDICTION

The judgment of the court of appeals (Pet. App. i-ii) was filed on June 20, 1966. A petition for rehearing *en banc* was denied on August 15, 1966. On November 15, 1966, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 28, 1966. The petition was filed on November 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly denied applications to renew the license and transfer control of a television station, when material facts pertaining to the station's ownership were misrepresented or concealed.

2. Whether the court of appeals correctly refused to consider petitioners' claim of disparate treatment because they had not first presented that claim to the Commission.

3. Whether the Commission's action was improper because the television station was being managed by a receiver in bankruptcy under Chapter 11 of the Bankruptcy Act.

4. Whether the Commission abused its discretion in refusing to reopen the record for additional evidence, which petitioners could have offered before the hearing examiner.

STATUTES INVOLVED

Section 310(b) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. 310(b) provides in pertinent part:

> (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. * * *

Section 405 of the Communications Act, 48 Stat. 1095, as amended, 47 U.S.C. 405 provides in pertinent part:

> The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review * * * (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. * * * Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evi-

dence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. * * *

STATEMENT

After full administrative proceedings, the Federal Communications Commission denied three pending applications pertaining to Channel 13 in Las Vegas, Nevada (J.A. 270-281). The applications sought (1) renewal of the license of the Television Company of America ("TCA"), now assigned to Harry Wallerstein, TCA's receiver in bankruptcy, to operate television station KSHO-TV on Channel 13; (2) reassignment of the receiver's license back to TCA; and (3) transfer of control of the Nevada Broadcaster's Fund, Inc. ("the Fund"), a holding company which owns TCA, to Arthur Powell Williams (J.A. 14). The Commission found, as recommended by its examiner (J.A. 13-100), that individuals associated with TCA had misrepresented or failed to disclose material facts relating to the ownership and control of the station.[2]

The Fund, which was organized to acquire the television station,[3] agreed to buy TCA from its own-

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[2] The application seeking to transfer control of the Fund was filed by Reed R. Maxfield, Robert W. Hughes, Carl A. Hulbert and Alex Gold. The Commission held that Maxfield and Hulbert had no interest to transfer and that their names on the application were used simply to conceal further the misrepresentations and non-disclosures it found (J.A. 93-94, 99-100, 270, 271 n. 1).

[3] Petitioner Hughes was the principal organizer of the Fund.

ers in February 1959 (J.A. 18-19). Pending final transfer, the Fund also agreed to advance sufficient funds to meet the station's operating expenses. The sales agreement was not submitted to the Commission until nearly a month after the 30-day filing date provided by the Commission's rules (47 C.F.R. 1.613), and the collateral agreement relating to operating expenses was never disclosed (J.A. 19-20, 95). As the Fund was unable to perform this agreement because it lacked sufficient capital, the parties made a new sales agreement in July 1959. The application to the Commission for approval was filed late, but the date on the contract was altered to create the appearance of compliance with the 30-day filing requirement (J.A. 25-26, 95). In addition, certain ownership and financial data contained in the application were falsely reported (J.A. 28-33, 96). Nevertheless, unaware of the misrepresentations, the Commission approved the transfer of control to the Fund on November 4, 1959 (J.A. 33, 96-97), and the transfer was consummated the following month.

After the Commission's approval, various changes in the ownership of the Fund's stock occurred—commencing in the period prior to consummation of the transfer and continuing thereafter. However, the ownership reports filed with the Commission by petitioner Gold [4] on behalf of the Fund and TCA never reflected the true ownership of the Fund's stock (J.A. 68-70, 97, 103).

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[4] At the time of these filings, petitioner Gold was both general manager of KSHO-TV and president of the Fund (J.A. 69).

Between March and August 1960, KBLI, Inc., a corporation controlled by Howard Johnson, bought a controlling interest in the Fund (J.A. 37-40). Johnson instructed petitioner Hughes, who is also his attorney, to file an application with the Commission for transfer of the station's control to KBLI. Hughes advised that the application would not be approved because KBLI was not financially qualified (J.A. 42, 49, 99). KBLI's controlling interest was not disclosed to the Commission until the hearing in this case in 1964.[5]

On May 1, 1961, TCA petitioned for an arrangement under Chapter 11 of the Bankruptcy Act, 11 U.S.C. 701-799 (J.A. 57-58). The following month, Arthur Powell Williams reached final agreement with KBLI and other Fund shareholders to purchase KSHO-TV (J.A. 52-54).[6] The three applications involved here were filed with the Commission in order to implement this agreement. On three separate occasions during the proceedings on these applications, the Commission received untruthful stock ownership reports; it did not learn the true facts until the evidentiary hearing (J.A. 64-67, 70-78, 100-101).

The Commission found that petitioners' misrepresentations and non-disclosures "were the result of the

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[5] During this same period, KBLI declared its controlling interest in the Fund to the Securities and Exchange Commission and the Idaho Securities Commission (J.A. 41, 43, 98-99).

[6] Although a party in the original Commission proceedings, Williams did not appeal and is therefore not a party in this Court.

almost incredibly lax manner in which the affairs of the business entities involved were conducted * * *." It also found that "a policy of deliberate concealment of the KBLI, Inc. interest was initiated and maintained" (J.A. 274, 275). The three applications were denied (J.A. 277). Following the decision, the receiver and petitioners Hughes and Gold petitioned for reconsideration, rehearing, and to open the record (J.A. 282-291, 292-306). The Commission denied these requests (J.A. 307-315). On review, the court of appeals affirmed the Commission's decision, *per curiam* (Pet. App. i-ii).

ARGUMENT

Petitioners present no issue warranting review by this Court.

1. Relying on *Melody Music, Inc.* v. *Federal Communications Commission*, 345 F.2d 730 (C.A.D.C.), petitioners contend that the Commission's action was invalid because the agency failed to distinguish this case from other cases[7] in which it has renewed licenses. But *Melody Music* held only that the Commission must explain why parties to the same misconduct—there, "fixing" a particular quiz program—were treated differently in contemporaneous pro-

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[7] *General Electric Co.*, 2 Pike & Fischer R.R. 2d 1038; *Westinghouse Broadcasting Co.*, 22 Pike & Fischer R.R. 1023; *NBC, Inc.*, 37 F.C.C. 427; *Melody Music, Inc.*, 2 F.C.C. 2d 958; *The Noble Broadcasting Corp.*, 1 F.C.C. 2d 154; *Lee Broadcasting Co.*, F.C.C. Mimeo No. 58458.

ceedings. That case is plainly inapposite here.[8] The Commission is not precluded from adopting a valid remedy to redress a licensee's misrepresentations because it has in the past applied a less stringent remedy in some other misrepresentation cases. As this Court held in *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228, the Commission is not bound in misrepresentation cases "to deal with all cases at all times as it has dealt with some that seem comparable." The Commission's decision not to renew the license in this case is amply justified by petitioners' demonstrated misconduct and lack of candor, and is neither unreasonable nor unprecedented.[9]

2. The court of appeals correctly refused to consider the merits of petitioners' "disparate treatment" argument because they had not given the Commission an opportunity to pass on it before seeking judicial

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[8] It should be noted that Chief Judge Bazelon, author of the *Melody Music* opinion, was a member of the panel that decided this case.

[9] See, *e.g.*, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Lorain Journal Co.* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A.D.C.), certiorari denied, 383 U.S. 967; *Robinson* v. *Federal Communications Commission*, 334 F. 2d 534, 536 (C.A.D.C.), certiorari denied, 379 U.S. 843; *Pinson* v. *Federal Communications Commission*, 321 F. 2d 372 (C.A.D.C.); *Immaculate Conception Church of Los Angeles* v. *Federal Communications Commission*, 320 F. 2d 795 (C.A.D.C.), certiorari denied, 375 U.S. 904.

In none of the cases cited by petitioners, see note 7, *supra*, did the applicant engage in a deliberate refusal to comply with statutory disclosure requirements essential to the Commission's regulatory responsibilities, as petitioners did here. See *Lorain Journal Co.* v. *Federal Communications Commission*, *supra*, 351 F. 2d at 830.

review (Pet. App. i-ii). In their request for reconsideration, petitioners Hughes and Gold simply referred to other Commission decisions (n. 7, *supra*) and "submitted that the Commission recognized the equities in [those] cases and should in this matter" (J.A. 300). They did not claim disparate treatment or invoke *Melody Music*, which had been decided some four and a half months earlier. Petitioners had ample opportunity to argue their claim of disparate treatment to the full Commission, but failed to do so. Having failed to present the issue to the Commission, they are barred from raising it before the reviewing court. See *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-500; *United States* v. *Tucker Truck Lines*, 344 U.S. 33; Communications Act of 1934, § 405, as amended, 47 U.S.C. 405; Administrative Procedure Act, § 10(e), 5 U.S.C. 706; 3 Davis, *Administrative Law Treatise*, § 20.06 (1958).

3. Petitioners urge that the Commission's refusal to grant their application frustrated their pending proceeding under Chapter 11 of the Bankruptcy Act (Pet. 41-43). But the bankruptcy proceedings in no way controlled the license-renewal proceedings involved here, and the Commission properly declined to "renew the license of an unfit licensee merely because the District Court has rendered it viable financially" (Pet. App. x). It would be anomalous indeed to require the Commission to renew a license tainted by misrepresentation and concealment when the

guilty parties were still associated with the station involved, simply because the licensee is in financial difficulties. While bankruptcy proceedings leading to liquidation have been held to render past licensees' misconduct immaterial (*Twelve Seventy, Inc.*, 2 F.C.C. 2d 973; *Arthur A. Cirilli, Trustee in Bankruptcy*, 2 F.C.C. 2d 692), in those cases the persons responsible were completely disassociated from the station involved and could not benefit from the liquidation. Here, the guilty persons have continued their association with the station and one of the applications is to transfer the license from the receiver to the debtor corporation, which they still dominate and control. Under these circumstances, it was appropriate for the Commission to take account of the character and qualifications of petitioners in making its determination.

4. Petitioners' other contentions are not substantial. They object to the Commission's refusal to reopen the record to receive evidence concerning the scope, quality and nature of Station KSHO's broadcast service (Pet. 32-33). But petitioners had every opportunity to develop a record on the station's past broadcast performance either before the examiner or before the Commission by timely applying to the Commission for enlargement of the hearing issues.[10] Surely, the evidence was not unavailable at the time of the hearings. See 47 U.S.C. 405.

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[10] This was the procedure followed in *E. G. Robinson, Jr.*, 21 Pike & Fischer R.R. 569, 572, and *Melody Music, Inc.*, 22 Pike & Fischer R.R. 870, 871.

Similarly, the Commission's refusal to reopen the record to add testimony by a former attorney for the Fund concerning the preparation of documents and reports was proper and not unreasonable. The Commission correctly ruled that petitioners' wrongful conduct, amply supported by the record, "cannot be attributed to their attorney" (J.A. 309).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
WILLIAM R. WEISSMAN,
Attorneys.

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,
Federal Communications Commission.

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No. 791

In the Supreme Court of the United States

October Term, 1966

HARRY WALLERSTEIN, RECEIVER OF TELEVISION COMPANY OF AMERICA, INC., ALEX GOLD, and ROBERT W. HUGHES,

Petitioners,

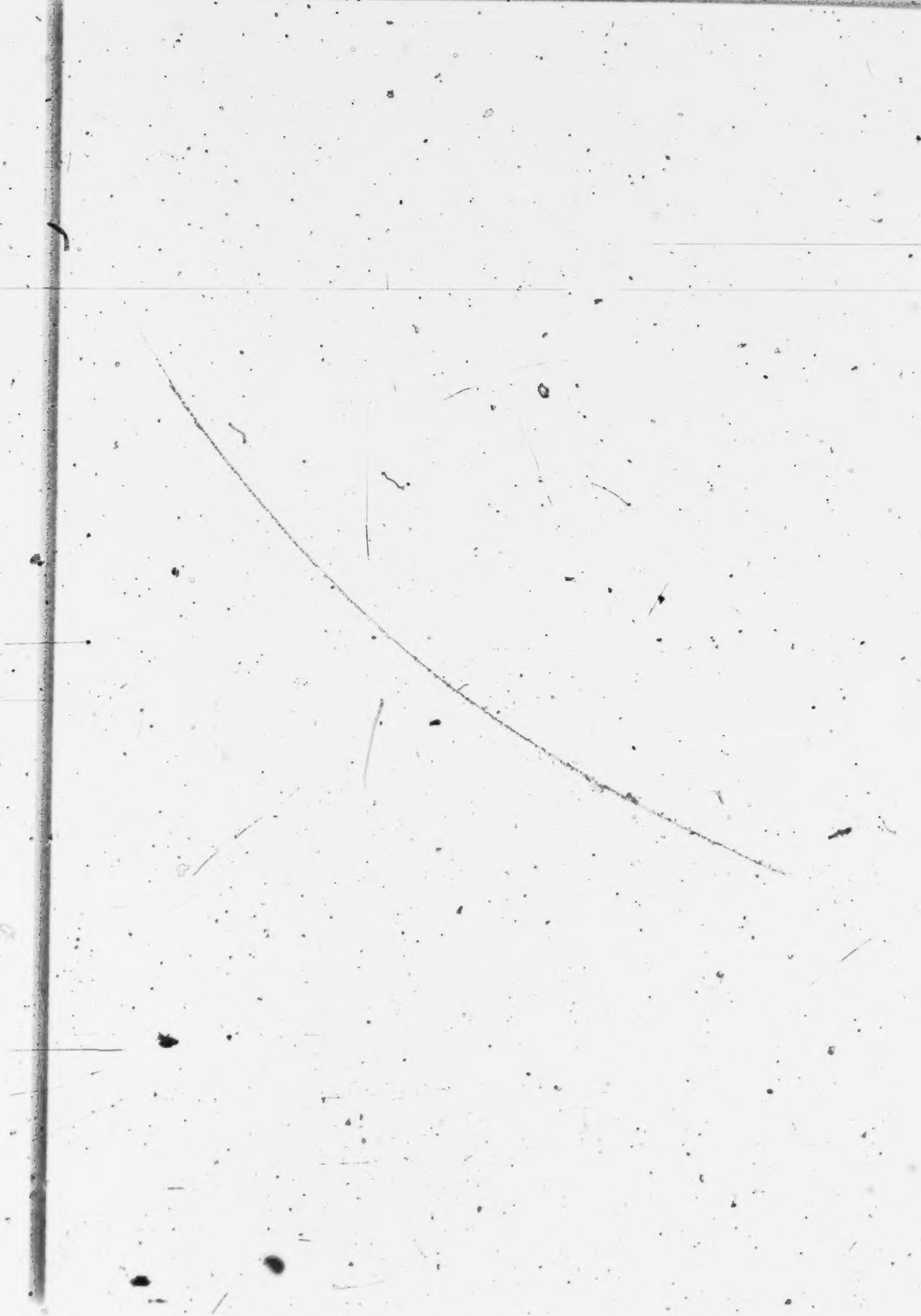
v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR REHEARING

MADISON B. GRAVES
ROBERT W. HUGHES
116 South 4th St.
Las Vegas, Nevada
Suite 425, Newhouse Bldg.
Salt Lake City, Utah
Attorneys for Petitioner
HARRY WALLERSTEIN
Receiver
ALEX GOLD
ROBERT W. HUGHES



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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR REHEARING

Petitioners request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District Court of Columbia Circuit was denied on February 13, 1964.

Pursuant to Rule 58, S.C.R. petitioners respectfully request the Court to reconsider its Order and grant Certiorari in this matter. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

GROUNDS FOR REHEARING

1. The Federal Communications Commission ("Commission") in enunciating a new policy in February of 1966, relative to the renewal of broadcast licenses of court appointed receivers under the Bankruptcy Act, set forth new law which constitutes intervening circumstances of substantial effect whereby certiorari should be granted. This policy affirms the very acts the receiver has attempted to accomplish in the above matter which the Commission has refused to grant.

2. The Commission in refusing to renew the license of Receiver Wallerstein is acting grossly unfair and is discriminating in its treatment of court appointed receivers under the Bankruptcy Act.

STATEMENT

The Commission has interpreted that its function is to renew broadcast licenses of court appointed receivers under the Bankruptcy Act, notwithstanding that prior license holders or officers of licensee holders may have been guilty of violations of the Commission's rules and regulations. This policy was enunciated in *Arthur A. Cirilli, Trustee in Bankruptcy,* 2 F.C.C. 2nd 973. The facts of that case are similar to this one in that the Commission granted an involuntary assignment of license in both instances to the Trustees in Bankruptcy. However, in the *Cirilli* case, the prior licensees' sole stockholder was sentenced to a one year probation in the United States District Court after pleading guilty to an indictment supporting sixteen counts of mail fraud and five

counts of radio fraud in violation of Section 1341 and 1343 Title 18, U.S. Code. The question then arose in the *Cirilli* case whether or not a hearing into the past conduct of the stockholder would be relevant to determine whether a renewal of the trustee's license should be granted. The Commission determined that since the stockholder was no longer associated with the station; and in fact, the station was being operated by a receiver pursuant to the Bankruptcy Act, that no useful purpose would be served in holding a hearing relative to the broadcast qualifications of the prior licensee.

In the instant case, the Commission did precisely what it said no useful purpose would be accomplished in doing, i.e. holding a hearing to determine the broadcast qualifications of a former licensee.

On the 1st day of May, 1961, Television Company of America, Inc. ("TCA") filed its petition for reorganization under Chapter XI of the Bankruptcy Act. It's petition provided that it would act as a debtor in possession. The Bankruptcy Court appointed Harry Wallerstein Receiver on November 16, 1961.

Wallerstein, from his appointment to the present time, has operated KSHO-TV in the public interest. There is no claim by the Commission that Receiver Wallerstein in five and one-half years has not operated KSHO-TV in the public interest. The Arrangement approved by the creditors of TCA and the Bankruptcy Court provided the following:

1. 25% payment in cash or 50% payment in stock of all general creditors.
2. Payment in cash to the following creditors

upon transfer of license from receiver to proposed licensee.

(a) Prior owners of KSHO TV	$140,000.00
(b) KBLI, Inc.	53,000.00
(c) Public stockholders of ultimate licensee corporation (either the return of their investment plus interest or continued stock ownership, at the election of each stockholder)	
Approximately	42,750.00

None of the persons receiving the amounts above designated were involved in the violations of the Commission's rules with the exception of the officers of KBLI, Inc. The Commission found that there was a willful concealment of ownership in Nevada Broadcasters Fund, Inc., ("Fund") by KBLI, Inc. (JA 274). KBLI, Inc. is a public corporation with approximately 1200 shareholders who purchased approximately $650,000 worth of stock while the officers of KBLI owned, through a corporation they controlled, 35,000 shares of KBLI, Inc. stock, par value $1.00 per share. The officers of KBLI, Inc. owned 6,250 shares of stock in the Fund which constitutes a minority interest, and they voluntarily agreed after the hearing before the Commission to give up their stockholdings in the Fund (J.A. 149).

ARGUMENT

The Commission in *Arthur A. Cirilli, Trustee in Bankruptcy* (WIGL) Superior, Wis., 2 FCC 2nd 692, on February 23, 1966, enunciated the new rule set forth

below after observing that applications involved in bankruptcy had caused "no little concern." The Commission stated in *Twelve Seventy, Inc.*, 2 F.C.C. 2nd 973, that it had recently had occasion to consider the problem of renewal of a receiver's license and its subsequent transfer in the *Cirilli* application. The licensee in that application had been guilty of misconduct reflecting adversly on his character qualifications; he was adjudicated a bankrupt after the filing of an application for renewal of license and the trustee in bankruptcy desired to dispose of the stock so that the proceeds of the sale could be disbursed to creditors. The Commission then referred to its opinion in *Arthur A. Cirilli, Trustee in Bankruptcy*, 2 F.C.C. 2nd 692, as follows:

> ". . . this is not a case in which a licensee who is guilty of misuse of a license or other misconduct attempts to transfer the license to avoid the consequence of his action. No special interest would be served by hearing on the qualifications of Haig (former licensee) on his right to a renewal of license. In reaching this conclusion, we do not intend, thereby, to abandon the Commission's basic policy that consent to an assignment or a transfer of control of a licensee is contingent upon a finding that the licensee is qualified to receive a renewal. However, where the licensee is in the hands of a trustee in bankruptcy, and is already in the process of liquidation, strict enforcement of the policy will not serve the public interest."

The Commission proceeded, in *Twelve Seventy, Inc.*, 2 F.C.C. 2nd 973, to attempt to distinguish its action and conclusion as not being inconsistent with its action in this case, *Television Company of America, Inc.*, 1 F.C.C. 2nd 91, 5 Pike and Fisher R.R. 2nd 811

where it denied the request for renewal of license by Receiver Wallerstein. The Commission, after first stating the receiver was innocent of any wrong doing, stated much of the misconduct complained about occurred after the appointment of Wallerstein and resulted from the continued association of some of the wrongdoers with the affairs of the station. "Moreover, the receiver proposed a transfer back to the corporate licensee which was still controlled by the individuals who had committed numerous acts of misconduct in their improper dealings with the Commission."

The Commission's statement that "much of the misconduct occurred after the appointment of the receiver and resulted from the continued association of some of the wrongdoers with the affairs of the station" is an absolute false statement of the facts of this case.

The Commission is correct that the receiver proposed to transfer back to the corporate licensee whose shareholders had been found by the Commission to have committed numerous acts of misconduct. However, under the proposed Arrangement as approved by the Bankruptcy Court, the only shareholders of the proposed licensee corporation who were still shareholders and who had been guilty of any wrongdoing were the officers of KBLI, Inc., namely, Howard D. Johnson, Gage R. Anderson and L. John Miner who jointly owned 6,250 shares of the stock (JA 129).

The Commission's statement in *Twelve Seventy, Inc.*, 2 F.C.C. 2d 973 (page 977), that these individuals still controlled the corporation is a gross misstatement of fact. Their stock ownership was approximately five per cent and they voluntarily offered to relinquish their

stockholdings. (J.A. 147.) In any event, their total stockholdings were de minimus.

The Commission went on to note in the *Twelve Seventy* case that the ultimate transferee to whom Wallenstine proposed to assign the license may have been innocent of any misconduct, but manifestly there did not exist the complete disassociation of the guilty parties from the operation and control of KSHO-TV. Again this is a shocking misstatement and conclusion in light of the actual fact that the proposed transferee would comprise of innocent stockholders and the transfer would accomplish the very thing which the Commission directed in *Twelve Seventy, Inc.*, 2 F.C.C. 2nd 973, and *Athur A. Cirilli, Trustee in Bankruptcy*, 2 F.C.C. 2nd 692.

CONCLUSION

Even-handed justice requires that petitioners be treated the same as other licensees and parties with similar facts, and that a Writ of Certiorari should be granted in this matter.

Respectfully submitted,

ROBERT W. HUGHES
MADISON B. GRAVES

Suite 425, Newhouse Building
Salt Lake City, Utah, and
116 South 4th Street
Las Vegas, Nevada

Attorneys for Petitioners

Harry Wallerstein, Receiver
Alex Gold
Robert W. Hughes